Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1511

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

NICHOLAS A. POLITO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First Judicial Distirct, entered in this cause on September 24, 1976.

OPINION BELOW

The opinion of the Appellate Court is reported at 42 Ill. App. 3d 372, 355 N.E. 2d 725 (1976), and is reprinted herein as Appendix A.

JURISDICTION

The opinion of the Appellate Court (reproduced herein as Appendix A), affirming the judgment of the Circuit Court of Cook County, Illinois, was entered on September 24, 1976. A timely Petition for Leave to Appeal to the Illinois Supreme Court from the judgment of the Appellate Court was denied on January 28, 1977. (See Appendix B) This Petition is filed within 90 days of the final order of the Illinois Supreme Court denying leave to appeal.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether the Fourth and Fourteenth Amendments to the United States Constitution require police officers to knock and announce their intended entry into private premises when executing a valid arrest warrant, where the officers have probable cause to believe that a crime is occurring at the time of said entry.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..."

United States Constitution, Amendment XIV, Section I:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

A.

Background

In September of 1969, the defendant Nicholas Polito was indicted for rape, attempt rape, battery, and deviate sexual assault. In July of 1970, after a bench trial in the Circuit Court of Cook County, Illinois, the defendant was found guilty of battery and deviate sexual assault. These convictions were reversed by the Appellate Court of Illinois, First Judicial District, for reasons not here material, and the cause was remanded for a new trial. *People v. Polito*, 21 Ill. App. 3d 182, 315 N.E. 2d 84 (1st Dist. 1974).

B.

Manner In Which The Federal Question Was Raised.

Prior to the defendant's second trial, a "Second Amended Motion To Quash Arrest And Suppress Evidence" was made (R. C121-122; Tr. 2). In support of his motion, the defendant alleged, *inter alia*, that police officers "entered the office wherein the arrest was effectuated without announcing their purpose and authority and with the use of excessive force", and that the arrest and subsequent search of his person and premises "were effectuated in violation of defendant's rights against unlawful searches and seizures guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. . . ." (R. C121-122). After a hearing, the trial court found:

> In this case the police had arrest warrants for the defendant. In executing those warrants . . . instead of knocking on the door or announcing who they were, they broke the door down with the sledgehammer. . . . [Tr. 133-134]

The trial court noted that there was an absence of "exigent circumstances" to justify the manner of police entry (Tr. 134-140), and it held that the defendant's Fourth Amendment rights were abridged. The motion to suppress was sustained (Tr. 140-141).

Relying on "the announcement requirement set forth in *Ker*" [*Ker v. California*, 374 U.S. 23 (1963)] and its own finding that no exigent circumstances existed in the case, the Illinois Appellate Court affirmed the judgment of the circuit court of Cook County. *People v. Polito*, 42 Ill. App. 3d 372, 355 N.E. 2d 725 (1976).

A Petition for Leave to Appeal to the Illinois Supreme Court was denied. The Federal question herein presented was properly raised and preserved at all stages of this case.

C.

Facts Material To The Questions Presented

A hearing on the defendant's motion to quash arrest and suppress evidence was held in February, 1975.

Louis Cantone, a Chicago police officer, testified at the hearing that he arrested the defendant Polito on August 15, 1969, pursuant to an arrest warrant issued on the previous day. (Tr. 20, 26-27, C9) By way of further testimony and stipulation, it was determined that Cantone possessed on August 15 information concerning complaints by females about the defendant's practice of dentistry. (Tr. 34-35, 48-49) One Alice Svinning, an employee of the defendant, complained to the Cook County, Illinois, State's Attorney's Office that on August 7 and August 8, 1969, she had been sexually molested by

the defendant. The defendant was ostensibly performing dental work on Svinning, who was "placed under a gaseous drug and knocked unconscious," at the time of the alleged sexual attacks. Alice Svinning told Cantone that she believed these sexual attacks took place on a couch in Paul Hauser's office (Tr. 47-49), which was "down the hall" from the defendant's office. (Tr. 46) Svinning also related to Officer Canton that she told the defendant she "felt" she had been sexually molested, and "she knew that she had been taken from the doctor's [defendant's] work office to this other office [Paul Hauser's office] and didn't know why she had been taken to the other office." (Tr. 52)

Alice Svinning agreed to notify Louis Cantone regarding the performance by defendant of further dental work on her teeth. On August 14, 1969, Svinning informed Cantone that the defendant was to work on her teeth the following day. (Tr. 34-42)

Alice Svinning also agreed to have "iridescent"* powder placed in her vagina prior to the dental work (Tr. 58), and to give Cantone a "pre-arranged signal" when she was about to be rendered unconscious by a pill and gas. (Tr. 39-40, 54)

Louis Cantone further stated that the arrest of defendant occurred in a "two-story building" located in Palos Heights, Illinois. (Tr. 20-21) Prior to the arrest, Alice Svinning gave the pre-arranged signal—she lit a cigarette—to Cantone and other policemen who were in the vicinity of the building. (Tr. 23, 39-40, 53-54) Also prior to the arrest, Louis Cantone observed the defendant enter the "work area" of his office and pick up

* The Illinois Appellate Court characterized this powder as "phosphorescent". 42 Ill. App. 3d at 374, Fn. 1.

"what appeared to be a gas mask." Cantone was told by other police officers that the defendant "turned down" the lights in the office, at which time he saw Alice Svinning "leave the office". (Tr. 43-44)

The police entered the building, proceeded to the defendant's office and found no one present therein. They then "walked down the hall directly to Paul Hauser's office". Cantone "listened at the door" and heard "music playing softly from inside." (Tr. 42, 45-46) The police "knocked the door open" with a sledgehammer. No police officer knocked on the door or announced their presence or purpose prior to entry. (Tr. 21-24, 54-55) The defendant was arrested and certain items of evidence were seized. (Tr. 20-21, 60)

Harold McGrath next testified that he participated in the arrest of the defendant. (Tr. 7-8) McGrath took photographs and made certain observations of persons and property in the room where the arrest was effectuated. (Tr. 8-10, 18-19) McGrath stated that entry into the room was accomplished when a policeman "struck the door with a sledgehammer", and that prior thereto he neither saw nor heard anyone knock on the door or announce their office. (Tr. 10-11)

The defendant, Nicholas Polito, stated that he was arrested in Paul Hauser's office, and that he used Hauser's office for personal relaxation and "as a recovery room on occasion by my patients." (Tr. 107-109, 116) While Alice Svinning was in the defendant's employ, she did not have occasion to bring patients into Hauser's office for purposes of "recovery." (Tr. 127)

REASONS FOR GRANTING THE WRIT

THE FAILURE OF POLICE OFFICERS TO KNOCK AND ANNOUNCE THEIR INTENDED ENTRY INTO AN OFFICE TO EXECUTE A VALID ARREST WARRANT DID NOT VIOLATE THE DEFENDANT'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE POLICE HAD PROBABLE CAUSE TO BELIEVE THAT ANOTHER SEXUAL ATTACK, SIMILAR TO THOSE WHICH PROMPTED ISSUANCE OF THE ARREST WARRANT, WAS OCCURRING THEREIN.

The State of Illinois submits that the holding of the Appellate Court in the instant cause constitutes an unduly restrictive interpretation of the standard of reasonableness imposed on it by the Fourth Amendment, in two significant respects: first, the Appellate Court has improperly extended the scope of the Fourth Amendment by holding constitutionally impermissible an unannounced forcible entry for the purpose of police observation of a crime in progress, where the police have probable cause to believe that the crime is occurring immediately prior to the entry; second, the Appellate Court has effectively emasculated an important and concededly valid* reason for the unannounced forcible entry which occurred herein—the "need to protect or preserve life or avoid serious injury", which is "justification for what would be otherwise illegal. . . ." *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir.), *cert. denied* 375 U.S. 860 (1963); *Ker v. California*, 374 U.S. 23, 47 (1963) (Mr. Justice Brennan's dissent).

The Appellate Court in the instant case found that the State's admitted desire to catch the "defendant in the actual commission of the crime" did not constitute "exigent

* *People v. Polito*, 42 Ill. App. 3d 372, 376.

circumstances" such as would justify the manner of entry here. This holding is based on the Appellate Court's conclusions that police desire to view a crime in progress is "not so unusual as to warrant a suspension of defendant's constitutional rights" and that the "'iridescent' powder which appeared on defendant was sufficient to convict defendant without eyewitness testimony." 42 Ill. App. 3d 372, 377, 378.

The State of Illinois respectfully asserts that, although police desire to observe first-hand the commission of a crime is indeed not "unusual", such a desire is not determinative of the right to enter in the manner utilized here. Rather, the crucial factor is whether probable cause to believe that a crime is occurring immediately prior to entry exists. The police here knew by reason of conversations with the victim that the defendant engaged in sexual crimes while female patients were anesthetized; they knew that these crimes had occurred in Paul Hauser's office; the police did not know that the defendant occasionally used Hauser's office as a recovery room for patients (indeed, even the victim, defendant's employee, was apparently unaware of this fact); the police saw, on the date of the arrest, the defendant pick up a "gas mask" and they saw the defendant turn down the lights in the office; they found no one in the defendant's work room; they went to Hauser's office, the known site of these crimes, and heard "music playing softly from inside". On the basis of these facts, known to the police at the time of entry, there was probable cause to believe that a crime against the person was occurring. There was, conversely, no reason for the police to associate known facts with innocent activity in Hauser's office. Because the police officers had probable cause to believe that a crime against the person was occurring immediately prior to their entry, the manner of entry

did not offend the commands of the Fourth Amendment. The contrary holding of the Illinois Appellate Court, based on the "not so unusual" desire of the police to witness a crime in progress, constitutes an unwarranted intrusion on the legitimate functions of law enforcement personnel and should be overturned as being inconsistent with the standard of reasonableness imposed on the State by the Fourth Amendment. The Constitution does not prohibit an unannounced forcible entry for the purpose of observing the commission of a crime when that entry is based on the existence of probable cause.

The Appellate Court also held that the manner of entry here was not warranted by a desire to apprehend the defendant in the act of committing a sexual assault because "the 'iridescent' powder which appeared on defendant was sufficient to convict defendant without eyewitness testimony." 42 Ill. App. 3d 372, 378. The State of Illinois respectfully submits that the Fourth Amendment does not authorize the Appellate Court to exert control over the quality and nature of evidence in criminal cases where the evidence is acquired in a manner consistent with the standard of reasonableness inherent therein. As discussed above, the manner of entry in this case was reasonable because it was founded upon probable cause to believe that a sexual attack was occurring within immediately prior to entry.

Additionally, although the Appellate Court agreed that the victim in this case was in "jeopardy", it nevertheless refused to elevate this physical peril to emergency status justifying an unannounced forcible entry. The rationale of the Appellate Court in this respect is found in its statement that a "proper entry here would not have protected the complainant from peril." 42 Ill. App. 3d 372, 377.

This conclusion of the Appellate Court—that a "proper entry here would not have protected the complainant from peril"—is based on its reference to two time periods prior to the entry. 42 Ill. App. 3d 372, 377. The first time period preceded administration by the defendant of anesthetizing gas to his victim. As such, this time period is patently irrelevant to decision of the issue, because the police officers knew from their investigation that allegations of the defendant's sexual crimes involved a time span subsequent to administration of the gas. Since the police thus had reason to believe that the victim was not then in need of protection, the time period prior to administration of the gas cannot justify the Appellate Court's ruling that the entry here was constitutionally impermissible.

The second time period cited by the Appellate Court, in support of its conclusion that a "proper entry here would not have protected the complainant from peril", followed administration of anesthesia. According to the Appellate Court:

> . . . *The record does not indicate how long the police waited*, however, in *argument* counsel for defendant referred to a 40-minute lapse while the prosecutor referred to a 20-minute lapse. Either time frame would indicate less than a precisely timed and executed plan to save complainant from sexual molestation. [42 Ill. App. 3d at 377] [emphasis added].

The State of Illinois submits that the Appellate Court's stated reliance on argument of counsel, rather than on facts of record, to extend the reach of the Fourth Amendment beyond its proper scope, and to thereby thwart legitimate law enforcement efforts, should not be permitted to stand by this Court.

The Appellate Court's preoccupation with the time periods above-discussed is inextricably bound to its observation that "the whole point of this plan was to catch defendant sexually molesting the complainant." 42 Ill. App. 3d 372, 377. The Appellate Court's opinion in these respects reflects an implicit assumption that the police "created" an emergency situation of which they sought to take advantage. The trial court herein, however, specifically found, in response to a claim of delay in execution of the arrest warrant as a pretext for entry, that "there was *no* subterfuge to get the defendant at the office at this particular time for the purpose of extracting evidence against him in the office." (Tr. 131) (emphasis added). There was, in fact, no creation by the police of an emergency situation such as might justify the Appellate Court's refusal to apply the "exigent circumstances" doctrine to the unannounced, forcible entry in this case.

In sum, the State asserts that the existence of probable cause to believe a sexual attack was occurring immediately prior to entry, rather than the manner of entry standing in isolation, is the overriding consideration in the instant cause. The contrary holding of the Illinois Appellate Court constitutes a gross distortion of the Fourth Amendment's balance between the needs of effective law enforcement and the right of the people to be secure against unreasonable searches and seizures, and should not be permitted to stand.

CONCLUSION

For the reasons stated, the Writ of Certiorari should be granted to review the judgment and opinion of the Appellate Court of Illinois.

Respectfully submitted,

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April 28, 1977

APPENDIX A

Opinion Of The Appellate Court

Mr. PRESIDING JUSTICE LORENZ delivered the opinion of the court:

Defendant was indicted for attempt (rape), rape, deviate sexual assault, and battery in violation of sections 8-4, 11-1, 11-3 and 12-3 of the Criminal Code. (Ill. Rev. Stat. 1969, ch. 38, pars. 8-4, 11-1, 11-3, 12-3.) Prior to trial, defendant filed a motion to suppress certain evidence alleging it was obtained through an unannounced forcible entry of private premises. The motion was sustained and the State now appeals, contending that exigent circumstances excused their method of entry.

At the hearing on the motion to suppress the following pertinent evidence was adduced:

For defendant

Louis Cantone

He is a Chicago police officer. In August, 1969, he was on assignment with the Cook County State's Attorney's Office in charge of the investigation of defendant, a dentist. The complainant, defendant's receptionist, told him that on August 7th and 8th, 1969, defendant had sexually molested her in an adjoining office. The alleged attacks occurred while defendant was supposedly extracting one of her teeth and she was unconscious having been drugged and gassed by defendant.

In order to obtain futher evidence against defendant, Cantone requested the complainant remain in defendant's employ and submit to further dental work. She agreed. On August 14th she informed him that she had a dental appointment with defendant the following evening. Before she went to defendant's office, he gave her further instructions, and "iridescent"[1] powder was applied to certain areas of her body.

He and seven other investigators positioned themselves in and around defendant's office building at 7227 West 127th Street, Palos Heights, on August 15, 1969. Defendant arrived at about 6:30 p.m. Later that evening the complainant, while seated in defendant's office lit a cigarette, which was the pre-arranged signal, indicating she had just been given a pill preparatory to the gas anesthesia. Sometime thereafter, he and the other investigators entered the second floor of the building using a key left by the complainant under the door mat on the first floor landing. After all exits were secured, they proceeded to defendant's office. Finding no one in defendant's reception room, lab or workroom, they went to Paul Hauser's office which adjoined defendant's. Complainant previously had told him that defendant had sexually molested her in Hauser's office. He turned the knob very slowly, but the door did not open. Listening at the door he could hear soft music playing. Without knocking or announcing the officers' presence, Investigator Gehrke broke open the door with a sledge hammer, and they arrested the defendant. The arrest took place between 10:15 and 10:45 p.m.

Although he had a warrant for defendant's arrest based on complainant's prior allegations and had seen

[1] Although the witnesses, attorneys and court repeatedly referred to an "iridescent" powder, it seems apparent they were speaking of a type of phosphorescent powder which when exposed to "black light" would glow.

him 10 to 15 times prior to the arrest, he made no attempt to arrest defendant earlier. Nothing would have prevented him from doing so, however, he "wanted to build a stronger case against him." Although aware of various items he intended to seize in defendant's office, he never attempted to obtain a search warrant.

Harold M. Grath

He was a Chicago police officer assigned as a photographer to the State's Attorney's Office. Prior to defendant's arrest on August 15, 1969, he was in the vicinity of defendant's office building for 12 hours. At about 6:30 p.m., he observed defendant enter the building. Although he was aware of a warrant outstanding for defendant's arrest, he did not attempt to arrest him at that time. At approximately 10:15 p.m. he participated in defendant's arrest. Entry was effected by breaking open the door with a sledge hammer. None of the investigators knocked or announced their office before entering. Prior to breaking open the door, he did not hear calls for help or screams. Once inside he took photographs of the premises.

Nicholas Polito, on his own behalf

He was arrested in an office leased by Paul Hauser. Hauser had given him a key and permission to use the office in 1961. Occasionally, he used the office as a recovery room for his patients and he also stored medications and pop in Hauser's refrigerator. He gave complainant authority to let "patients" into any of his offices, as well as Hauser's office, however, he never authorized her to allow anyone else to enter Hauser's office.

At the conclusion of defendant's testimony he sought to quash his arrest and suppress certain evidence, including the following physical evidence seized from the office where he was arrested:

(1) one gas mask
(2) one timer
(3) one smock with the initials "N.P."
(4) photographs of the room and persons in the room including the defendant and complainant
(5) one box containing prophylactics
(6) two white towels
(7) observations made by police and photographs taken of defendant when a "black light" was shined on him revealing the presence of phosphorescent powder.

He argued that arresting officers unlawfully: (1) entered private premises to arrest him without first announcing their authority and purpose, and (2) utilized an arrest warrant as a subterfuge to search private premises without obtaining a search warrant—all in contravention of his constitutional rights. (U. S. Const. amend. IV.) The court granted defendant's motion to suppress evidence based on his first argument, citing *People v. Stephens* (1974), 18 Ill. App. 3d 817, 310 N.E.2d 755, as authority. On appeal the State admits the arresting officers made an unannounced forcible entry, however, they contend that exigent circumstances existed at the time of the arrest, excusing compliance with any announcement requirement. (*Ker v. California* (1963), 374 U. S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726.) Therefore, the sole issue before us is whether circumstances existed in the instant case.

OPINION

We have reviewed the announcement requirement set forth in *Ker* and have found four recognized exceptions to the rule. Circumstances held to excuse compliance with the requirement exist when: (1) there is a possibility of destruction of evidence, (2) there is apprehension of physical peril, (3) there is a possibility of escape by defendant, or (4) compliance would be a useless gesture. (Annot., 21 A.L.R.Fed. 820 (1974).)[2] The State contends that two of these exceptions are applicable here. They also urge as exigent circumstances grounds which do not fit within the recognized exceptions above.

The State first contends that an unannounced forcible entry was required to preserve evidence from destruction. They argue that any delay caused by the arresting officers announcing their authority and purpose and then waiting an appropriate time for defendant's response, would allow defendant time to destroy certain evidence. In support of this contention they cite *People v. Hartfield* (1968), 94 Ill. App. 2d 421, 237 N.E.2d 193, and insist that *Hartfield* not *Stephens* correctly interprets the holding of *Ker*.

We fail to see the need here to embark on an extended discussion of the holdings in *Stephens*, *Hartfield*, and *Ker*. Of primary importance in all three decisions was the fact that the evidence seized was narcotics, a substance easily and quickly destroyed. Here, the physical evidence gathered by the police, with the exception of the "iridescent" powder, could not have

[2] Although this annotation deals with the Search Warrant Act (18 U.S.C. § 3109 (1948), this statute is the federal codification of the rule set forth in *Ker v. California* (1963), 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726, and the exceptions discussed therein are equally applicable to State prosecutions applying *Ker*.

been rapidly destroyed. And because defendant was unaware of the existence of the powder, there is no reason to believe he would have made any attempt to destroy this evidence even if he had known police were present. We believe, therefore, that both *Stephens* and *Hartfield* are inapplicable because any delay in entry caused by the arresting officers announcing their authority and purpose would not have resulted in the destruction of physical evidence.

The State next contends that the unannounced entry was necessary to protect the complainant from the danger of being sexually molested. A proper entry here would not have protected the complainant from peril. Complainant had been left alone with defendant for several hours. Even after she signaled the police that she was about to be anesthesized, they waited a sufficient time so they could be sure to catch the "defendant in the actual commission of a crime." The record does not indicate how long the police waited, however, in argument counsel for defendant referred to a 40 minute lapse while the prosecutor referred to a 20 minute lapse. Either time frame would indicate less than a precisely timed and executed plan to save complainant from sexual molestation. Indeed, the whole point of this plan was to catch defendant sexually molesting the complainant. We agree with the trial court, therefore, that the additional five to fifteen seconds it may have taken police to knock and announce their presence and purpose, thereby complying with the dictates of the Constitution, "would not have put the complaining witness in more jeopardy than she was already."

We have previously discussed exceptions one and two and found them inapplicable here. Likewise, exceptions three and four do not apply to the facts in the instant

case. The police had all exits blocked, so there was no danger here of a defendant escaping. Exception four is applicable in those instances where "the facts known to the officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture (citations)." (*Miller v. U.S.* (1958), 357 U.S. 301, 310, 78 S.Ct. 1190, 1196, 2 L.Ed.2d 1332, 1338.) No such facts exist here. None of the recognized exceptions, therefore, apply to the instant case.

The State also contends that the forcible entry was necessitated by the need to obtain direct evidence from conscious witnesses. Because complainant was unconscious during the alleged attacks, they argue that her testimony could be easily discredited. Police presence would assure credible testimony. Further, the officers were unaware of the exact nature of defendant's activities or in what state of dress or undress defendant performed them. Consequently, the State insists it was necessary for the officers to make a surprise entry in order to be sure to catch "defendant in the actual commission of the crime."

Although we find no precedent which discusses the issue the State raises here, we believe it is clear that neither desire "to build a stronger case," nor police speculation as to what evidence they might have missed had they made a proper entry is what the Supreme Court had in mind when they spoke of exigent circumstances. Undoubtedly, any case could be strengthened by the testimony of eight police eyewitnesses. And from a prosecution standpoint, it is always best to catch the defendant in the commission of a crime. However, such desires exist in all cases, and they certainly are not so unusual as to warrant a suspension of defendant's constitutional rights.

Moreover, the "iridescent" powder which appeared on defendant was sufficient to convict defendant without eyewitness testimony. Nonetheless, the State contends that the powder marks found on defendant were inconclusive, because he could argue that he improperly touched complainant and then with his hands distributed the powder to other areas of his body. Thus, all the State could prove is a battery. We cannot agree. Because the powder was applied to complainant's vaginal area the location and amount of the powder's subsequent appearance on defendant's body would be strong evidence of defendant's misconduct.

The State also argues that the lack of a "knock and announce" statute in Illinois excuses the arresting officers' method of entry. However, *Ker* sets forth a minimum constitutional standard of conduct, which must be followed regardless of the lack of State statutory provisions. Neither case cited by the State in support of this contention (*People v. Scott* (1969), 110 Ill. App. 2d 368, 249 N.E.2d 220; *People v. Scott* (1973), 13 Ill. App. 3d 620, 301 N.E.2d 118) discusses the exception of exigent circumstances as set forth in *Ker*. We, therefore, do not consider these cases good authority for the proposition the State urges us to adopt.

The State finally suggests that the complainant consented to the unannounced forcible entry of police. We disagree. First, there was no evidence in the record indicating her consent. Second, even assuming she consented, complainant did not have the right to do so because she did not have "joint access or control for the most purposes" over Hauser's office. (*U.S. v. Matlock* (1975), 415 U.S. 164, 171, n.7, 94 S.Ct. 988, 993 n.7, 39 L.Ed.2d 242, 250 n.7.) Defendant gave complainant as his employee limited right of control to allow "patients"

into Hauser's office. She, therefore, could not consent to an unannounced entry of the premises by police.

For the foregoing reasons the judgment of the circuit court is affirmed.

Affirmed.

SULLIVAN and BARRETT, JJ., concur.

APPENDIX B

49038 Cook SA

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January 28, 1977

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No. 49038 - People State of Illinois, petitioner, vs. Nicholas A. Polito, respondent. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1511

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

-vs-

NICHOLAS A. POLITO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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STATUTES INVOLVED

Illinois Revised Statutes 1969, Chapter 38, paragraph 107-5(d):

> All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to make an authorized arrest.

Illinois Revised Statutes 1969, Chapter 38, paragraph 108-8:

> All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant.

QUESTION PRESENTED FOR REVIEW

Whether police officers executing an arrest warrant may violate a State statute by breaking into private premises without a prior announcement of their authority and purpose, especially when the officers deliberately failed to utilize earlier opportunities to effect the arrest in a public place because they hoped to find evidence in the private premises.

STATEMENT OF THE CASE

Respondent was charged with deviate sexual assault and battery. Prior to trial, he filed a motion to quash his arrest and suppress illegally obtained evidence. (RC. 121-22) At a hearing conducted on the motion, the evidence established that a warrant for respondent's arrest was issued on August 14, 1969. (RC. 9, R. 27) The warrant was based upon a complaint by respondent's receptionist who alleged that respondent sexually molested her on August 7 and 8, 1969. (R. 38-39)

On August 15, 1969, a group of police officers under the direction of Chicago Police Sergeant Louis Cantone was assigned to arrest respondent. (R. 22-23) The officers positioned themselves about a building in which respondent's office was located and awaited his arrival. (R. 13) At approximately 6:30 p.m. respondent drove his automobile into a nearby gas station. (R. 13, 25) He told Chicago police officer Harold McGrath, who was apparently posing as a gas station attendant, of some difficulty he was experiencing with his automobile. (R. 13) Respondent then proceeded into the building in which his office was located. (R. 13-14, 25) Sergeant Cantone estimated that he observed respondent ten or fifteen times that day prior to the time of the arrest. (R. 25) However, Cantone did not attempt to arrest respondent on those occasions because he "wanted to build a stronger case against him." (R. 53) Sergeant Cantone was aware of items in respondent's office which he hoped to seize as evidence. (R. 60) Cantone, however, never attempted to obtain a search warrant. (R. 61)

At approximately 10:15 to 10:45 p.m., Sergeant Cantone and other police officers arrested respondent using a sledge

hammer to break open a door to the private office in which respondent was located. (R. 20-21, 23) Prior to such entry, no one knocked on the door or otherwise announced the officers' presence and purpose. (R. 23-24)

At the time of the officers' entry into the office and subsequent to respondent's arrest, they obtained the evidence they hoped to find in the office. (R. 9-10, 60-61)

Following presentation of the foregoing evidence, respondent's counsel requested that all evidence obtained by the police be suppressed because the manner in which the police entered the office was in violation of an Illinois statute and the Fourth Amendment to the Federal Constitution. (R. 74-75) Counsel also urged suppression of the evidence on the ground that the arrest in the office was merely a pretext to search for evidence without obtaining a search warrant. (R. 75-76)

The trial court granted the motion to suppress evidence on the grounds that the forcible entry of the office in question by the police without a prior announcement of their authority and purpose violated both an Illinois statute and the Fourth Amendment to the United States Constitution. (R. 131-41) The trial judge expressly found: "There is[sic] no exigent circumstances which would excuse the police from at least knocking and announcing their office." (R. 138)

REASONS FOR DENYING THE WRIT

THE UNNECESSARY AND UNREASONABLE FORCE EMPLOYED BY THE POLICE TO ENTER A PRIVATE OFFICE TO ARREST RESPONDENT VIOLATED STATE LAW THEREBY VITIATING THE LEGALITY OF RESPONDENT'S ARREST.

The legality of an arrest by state police officers is determined by state law. (Ker v. California, 374 U.S. 23, 37, 10 L. Ed 2d 726, 741, 83 S. Ct. 1623.) The Illinois Code of Criminal Procedure prohibits the use of unnecessary and unreasonable force in effecting an arrest. (Illinois Revised Statutes 1969, ch. 38, par. 107-5(d).)[1] A substantially identical provision of the Code concerning the use of force in the execution of a search warrant (Illinois Revised Statutes 1969, ch. 38, par. 108-8))[2] has been construed to require a prior announcement of authority and purpose unless there are exigent circumstances at the time of entry which excuse compliance with such requirement. (People v. Stephens, 18 Ill. App. 3d 817, 821,310 N.E. 2d 755; People v. Richard, 34 Ill. App. 3d 621, 339 N.E. 2d 400; People v. Jackson, 37 Ill. App. 3d 279, 345 N.E. 2d 509.) Inasmuch as the provisions of the Illinois Code of Criminal Procedure concerning the use of force in effecting an arrest and executing a search warrant employ the same operative language, the trial court correctly concluded that, absent exigent circumstances, a forcible entry of private premises to effect an arrest without a prior announcement by the police of their authority and purpose is violative of Illinois law. (R. 132)

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1. "All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to make an authorized arrest."

2. "All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant.

The arresting officers did not knock on the door, or otherwise announce their presence, authority or purpose, before they broke the door open to arrest respondent. Consequently, unless there was some exigent circumstance to justify the officers' failure to give notice of their intended entry, the force used to enter the office was unnecessary, unreasonable and in violation of Illinois law.

The trial court specifically found that there were no exigent circumstances which justified the arresting officers' failure to announce their authority and purpose prior to breaking into the office where the arrest was effectuated. (R. 135-138) Such finding was sustained by the Illinois Appellate Court. (People v. Polito, 42 Ill. App. 3d 372, 355 N.E. 2d 725.) The Illinois Supreme Court denied petitioner's request for further review.

Petitioner challenges the findings of the Illinois courts claiming that the officers' unannounced forcible entry was justified because they purportedly had probable cause to believe that a crime was in progress and sought to protect the complainant from harm. Petitioner's argument is defective for several reasons.

Initially it should be noted that there was no finding by the Illinois courts that the officers had probable cause to believe that a crime was being committed at the time of their unannounced forcible entry of the private office. The trial judge correctly concluded that there was no issue in the case concerning probable cause for a warrantless arrest since the arresting officers possessed a concededly valid arrest warrant. (R. 137)

Furthermore, there was no probable cause for the arresting officers to believe that a crime was being committed at the

time of their unannounced break-in to the office. The evidence indicated that the police received complaints from some of respondent's female patients that they were sexually molested by respondent while they were anesthetized in connection with dental care they received from respondent. (R. 34-38) On August 12, 1969, respondent's receptionist alleged that she had been sexually molested by respondent on August 7th and 8th, 1969. (R. 38, 48) She agreed to notify the police of her next appointment with respondent for dental work. (R. 39) On August 14, 1969, the complainant informed the police that she would be receiving dental care services from respondent the following day. (R. 39) On August 15, 1969, the day of the arrest, the complainant had "an iridescent powder" applied to her vagina. (R. 58) She "agreed to allow herself to be sexually molested" to obtain evidence against respondent. (R. 55) That night respondent arrived at his office at approximately 6:30 p.m. (R. 13, 25) The police did not attempt to arrest respondent until approximately four hours later. (R. 43) Prior to the arrest, the complainant signalled the police officers that she had taken a pill which ordinarily preceded the administration of anesthetic. (R. 54) Thereafter the officers observed respondent pick up "a gas mask or cannister" in his office. (R. 44) The office lights were turned down. (R. 44) The complainant left the office. (R. 44) The police subsequently entered respondent's office. (R. 45) No one was there. (R. 45) The police proceeded to an adjoining office where they heard "music playing softly from inside." (R. 46) They did not hear "any cries for help or screams." (R. 22) Prior to entering the office, the police did not observe respondent

commit any crime. (R. 22) Consequently, the officers merely had reason to believe that the complainant voluntarily took a pill and left respondent's office after which respondent picked up a gas mask or cannister, turned down the lights and also left the office. Such circumstances do not suggest criminal activity and, therefore, did not provide the officers with probable cause to believe that a crime was being committed.

Similarly, the officers had no reason to believe that the complainant was in a position of peril. Inasmuch as there was no probable cause to believe that a crime was being committed, there was no reason to believe that the complainant was in danger of any concomitant harm.

In addition, even if it is assumed for the sake of argument that the complainant was in a perilous position, the officers were not justified in forcibly entering the office without first announcing their presence and purpose because they created any potential peril. As aptly stated in McKnight v. United States, 183 F. 2d 977, 978:

> "To execute the warrant for [defendant's] arrest there was no necessity to break open doors; or, what comes to the same thing for legal purposes, none but what the officers themselves created.*** 'It would appear that the officers deliberately let him get to his own front door before they attempted to approach. If thereafter there was a semblance of emergency requiring the breaking of the door, it was created by the officers.' Neither policemen nor private citizens can justify breaking into a house, or other violence by deliberately creating an alleged necessity for it."

In the case at bar, the complainant "agreed to allow herself to be sexually molested" as part of a scheme designed by police to obtain evidence against respondent. (R. 55) Pursuant to such scheme, the police rejected a convenient opportunity to arrest respondent outside the building which housed his

office and permitted him to enter his office where he remained for several hours with the complainant. Thereafter the complainant voluntarily took a pill and went into the adjoining office where the arrest was eventually effectuated. If there was any danger to the complainant in these circumstances, it was the product of the scheme designed by the police in which the complainant willingly participated. Therefore, any supposed danger to the complainant cannot justify the officers' failure to announce their presence and purpose prior to forcibly entering the private office to arrest respondent.

Finally, there was no evidence presented to indicate that any danger to the complainant would have increased if the police complied with the requirement of announcing their authority and purpose before breaking into the office. Rather, the trial court found that the additional five to fifteen seconds it may have taken the police to comply with the announcement requirement " would not have put the complaining witness in more jeopardy than she was already." (R. 136) Therefore, the officers were not justified in failing to announce their presence and purpose prior to forcibly entering the office.

CONCLUSION

The trial court correctly concluded that the police violated an Illinois statute in effecting respondent's arrest. Since the judgment from which review is sought must be sustained as a matter of state law, no cogent reason exists for reviewing the constitutional basis of the judgment. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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